

APPEAL NO. 040354
FILED MARCH 29, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on January 23, 2004. The hearing officer resolved the disputed issues by deciding that the appellant (claimant) was not entitled to supplemental income benefits (SIBs) for the second (June 4 through September 2, 2003), or third (September 3 through December 2, 2003), quarters. The claimant appealed, disputing the determination of nonentitlement. The respondent (carrier) responded, urging affirmance.

DECISION

Affirmed.

The parties stipulated that the claimant reached maximum medical improvement on October 16, 2001, with a 24% impairment rating; that the claimant did not elect to commute any portion of the impairment income benefits; that the qualifying period for the second SIBs quarter began on February 20 and ended on May 21, 2003; and that the qualifying period for the third SIBs quarter began on May 22 and ended on August 20, 2003. Eligibility criteria for SIBs entitlement are set forth in Section 408.142(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102). The SIBs criterion in issue is whether the claimant made a good faith effort to obtain employment commensurate with her ability to work during the qualifying periods for the second and third quarters. The claimant contends that she had no ability to work during the relevant qualifying periods. It is undisputed that the claimant did not work or look for work during the relevant qualifying periods.

Rule 130.102(d)(4) provides that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work. The hearing officer determined that the claimant did not meet the requirements of Rule 130.102(d)(4) to show a total inability to work, that the claimant had some ability to work during the relevant qualifying periods, and that the claimant did not make a good faith effort to obtain employment commensurate with her ability to work during the relevant qualifying periods. The hearing officer concluded that the claimant is not entitled to SIBs for the second and third quarters.

Whether the claimant met the good faith criterion for SIBs entitlement was a fact question for the hearing officer to resolve from the conflicting evidence presented at the CCH. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. With regard to the

claimant's assertion that the hearing officer only relied on the videotape in making her determination, we note that the hearing officer specifically found that a functional capacity evaluation conducted on January 28, 2003, revealed the claimant possessed an ability to work, and that the claimant's treating doctor returned the claimant to restricted sedentary work status on February 17, 2003, just three days prior to the beginning of the qualifying period for the second SIBs quarter. The Appeals Panel has noted that medical evidence from outside the qualifying period may be considered by the hearing officer, insofar as the hearing officer finds it probative of conditions in the qualifying period in issue. Texas Workers' Compensation Commission Appeal No. 030719, decided April 30, 2003.

When reviewing a hearing officer's decision for factual sufficiency of the evidence, we should reverse such decision only if it is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Texas Workers' Compensation Commission Appeal No. 031052, decided June 19, 2003. Although there is conflicting evidence in this case, we conclude that the hearing officer's decision is supported by sufficient evidence and that it is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

We affirm the decision and order of the hearing officer.

According to information provided by the carrier, the true corporate name of the insurance carrier is **ZURICH AMERICAN LLOYDS** and the name and address of its registered agent for service of process is

**LEE F. MALO
12222 MERIT DRIVE, SUITE 700
DALLAS, TEXAS 75251.**

Margaret L. Turner
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Edward Vilano
Appeals Judge